United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be
argued by
James Wm. Moore

76-50

37

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the New York, New Haven and
Hartford Railroad Company, Debtor

LAWRENCE W. IANNOTTI, Successor Indenture Trustee Under The New York, New Haven And Hartford Railroad Company's First And Refunding Mortgage Dated As Of July 1, 1947; and

JACOB D. ZELDES, Successor Indenture Trustee Under The New York, New Haven And Hartford Railroad Company's General Income Mortgage Dated As Of July 1, 1947,

Appellants

MANUFACTURERS HANOVER TRUST COMPANY, Former Indenture Trustee Under The New York, New Haven And Hartford Railroad Company's First And Refunding Mortgage Dated As Of July 1, 1947; and

RICHARD JOYCE SMITH, Trustee Of The Property Of The New York, New Haven And Hartford Railroad Company, Debtor,

Appellees

On Appeal From The United States District Court For The District Of Connecticut, Honorable Robert P. Anderson, Circuit Judge, Sitting By Designation

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BRIEF OF RICHARD JOYCE SMITH, TRUSTEE OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

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December 20, 1976

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QUESTION PRESENTED

Whether in the exercise of its discretion the Reorganization Court, as a court of equity, properly dealt

with the novel conflict of interest and compensation questions which arose with respect to Manufacturers Hanover Trust Company ("Manufacturers"), indenture trustee under The New York, New Haven and Hartford Railroad Company's (the "New Haven") First and Refunding Mortgage, and its attorneys, Simpson Thacher & Bartlett ("ST&B")?

STATEMENT OF THE CASE

A few additional facts and some stated more explicitly will, we believe, set this case in a better perspective.

There has been a great deal of continuity in the New Haven's reorganization that has made easier the assessment of compensation to indenture trustees and their counsel under § 77(c)(12) of the Bankruptcy Act[1/]--the issue in this case as to Manufacturers, a former indenture trustee, and as to ST&B, its counsel.

Judge Anderson has presided over the New Haven reorganization since its inception on July 7, 1961, first as a district judge; later, and now, as a circuit judge sitting by designation.

Richard Joyce Smith has been a Trustee of the Estate since reorganization began, and has acted as sole Trustee for many years. During the early years, the problem was to keep the trains running and to merge or otherwise become a part of a trunk line railroad. Both feats were accomplished; and the latter preserved operations, particularly freight, that were vital to the economy of southern New England.

Trustee Smith and his co-trustees were able to sell the New Haven's rail operations to Penn Central for $125 million, with the understanding that as to price this was the floor and creditors were free to seek a higher price. The Reorganization Court recognized the propriety of this arrangement. (A 494).

1/ 11 U.S.C. § 205(c)(12).

The New Haven's rail and certain other assets were transferred to Penn Central on December 31, 1968. And eventually the Supreme Court set the price at $174.6 million on June 29, 1970--eight days after the Penn Central went into reorganization.2/ Following the Supreme Court's remand and in view of Penn Central's bankruptcy, the New Haven Reorganization Court on August 10, 1970, entered a sweeping order with broad notice provisions to determine what should be done, including whether the court should impose for the New Haven's benefit an equitable lien on the tangible property conveyed; and a constructive trust on one-half of the excess income from the Grand Central properties. (A 9-12).

Within a relatively short time the matter came on for hearing with the New Haven interests represented by, among others, Trustee Smith, and by Manufacturers as indenture trustee, with ST&B, its attorneys. Opposing interests included Manufacturers, as indenture trustee under the New York Central and Hudson River Railroad Co. Gold Bond Mortgage, with Kelley, Drye, Warren, Clark, Carr & Ellis, its counsel; and the Penn Central Estate represented by Covington & Burling. The latter then assumed the leading role in opposing the New Haven's asserted equitable lien and constructive trust.

2/ *See* New Haven Inclusion Cases, 399 U.S. 392 (1970).

The New Haven Reorganization Court imposed an equitable lien and constructive trust in favor of the New Haven;[3/] but on appeal this was set aside by this circuit for want of jurisdiction in the New Haven Reorganization Court. However, this Circuit was careful to state that it was in no way passing upon the merits of Judge Anderson's decision. In re New York, New Haven & Hartford Railroad, 457 F.2d 683 (2d Cir.), cert. denied, 409 U.S. 890 (1972).

Technical though the conflict of Manufacturers may be, it was found by Judge Anderson and conceded by all that ST&B made substantial and beneficial contributions to the New Haven Reorganization; and essentially all of these were made prior to any conflict between Manufacturers and the New Haven Estate.

3/ In re New York, N.H. & H.R.R., 330 F. Supp. 131 (D. Conn. 1971).

ARGUMENT

I. THE QUANTUM OF AWARDS WAS FAIRLY ARRIVED AT AND MADE.

The Judgment of June 30, 1976 (A 530) made awards for compensation and expenses to indenture trustees and a Bondholders Committee, and their respective counsel. With the exception of Messrs. Iannotti and Zeldes, the co-appellants who are successor-indenture trustees, all the remaining applicants had been in the reorganization since its inception in 1961 until after the Supreme Court had set the price for the New Haven at $174.6 million, approximately $50 million more than the Trustees had originally agreed upon. Although some of this increase was due to the Trustees of the New Haven Estate, the indenture trustees and the Bondholders Committee, nevertheless, had, over a decade and in varying degrees, contributed substantially to the increased price; had thereby benefited the Estate; and were entitled to substantial compensation. No one now contests this. And on the Statement of Postition of Trustee Smith analyzing the factors involved (A 270),the verified petitions of the applicants, and arguments, Judge Anderson, with his long familiarity, was able to make a careful and sound analysis of what each applicant had contributed. He also noted that the benefits were considerably contingent upon the New Haven's recovery from the Penn Central estate.

No objection was made by any party as to the quantum of any of the awards nor to the installment provisions, which Judge Anderson provided for the protection of the New Haven Estate.

Because, however, of the conflict of interest which the Court found in connection with Manufacturers, the Court tailored its order as to Manufacturers as follows:

> [I]t is Ordered . . . that the following petitioners be awarded the following amounts, including fees and expenses of their counsel:
>
> . . . .
>
> (3) Manufacturers Hanover Trust Company, expenses for itself in the amount of $103,018.34 and compensation for its counsel, Simpson Thacher & Bartlett, in the amount of $808,000.00 and expenses for its counsel in the amount of $15,234.81;
>
> . . . .
>
> It is FURTHER ORDERED that the foregoing expenses shall be paid one-half on or before January 6, 1977 and the remaining one-half on or before July 6, 1977; and
>
> It is FURTHER ORDERED that matters of compensation shall be paid in eight (8) equal installments; the first installment to be paid on or before September 30, 1976 and a like amount on each and every March 30 and September 30 thereafter to and including March 30, 1980, when said principal sum shall have been paid in full; and
>
> It is FURTHER ORDERED that in the event that there is a future recovery by the reorganization trustee of the New Haven Railroad of payments by the Penn Central or its successors or assigns, on account of the purchase price fixed by the Supreme Court for the New Haven properties in the New Haven Inclusion Cases, the reorganization trustee or his successor or successors shall pay to:

> (1) Manufacturers Hanover Trust Company 1/4 of 1% of all payments made on and after the date of this judgment, to the New Haven Estate in reorganization, for and on account of the purchase price, to be paid by the Penn Central for properties of the New Haven, as fixed by the judgment of the Supreme Court in the Inclusion Cases. Such total payment or payments shall equal but in no event exceed $304,416.67, and no interest or other increments shall be added to this sum, which said Trust Company shall receive in full accord and satisfaction of its claim for its own services, rendered the New Haven Estate provided in the event the Manufacturers Hanover Trust Company declines so to accept whatever may accrue to it under the foregoing computation the Trust Company's claim for services against the New Haven Estate shall be disallowed in toto; and to Manufacturers Trust on account of the services of its attorneys Simpson Thacher and Bartlett, 1/4 of 1% of such payment or payments 4/

Recognizing that ST&B had made substantial contributions to the New Haven Reorganization, Judge Anderson placed no limitations upon it except those of the type placed upon other attorneys, *i.e.*, provisions for installment payments. But because of what Judge Anderson regarded as Manufacturer's past and continuing breach of trust (A 576), he penalized Manufacturers to a limited extent by providing for a contingent payment of its compensation in an amount ranging from $0. to $304,416.67, depending upon the future recovery by the New Haven Trustee from Penn Central. (A 532). He did not assess a penalty in the brutal fashion the co-appellants urge: take everything as a matter of law, they say, from Manufac-

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4/ A 530-32.

turers--compensation and expenses; and do the same to its attorneys, although not involved in any conflict. And this recommendation is made to a Reorganization Court that is a court of equity.

But if the Chancellor is to achieve equity, he must have the right and leeway to exercise an informed discretion in light of all surrounding circumstances. Judge Anderson exercised this discretion in this case with which he had lived for fifteen years.

II. MANUFACTURERS' CONFLICT WAS TECHNICAL; AND NO LEGAL DAMAGE TO THE NEW HAVEN ESTATE HAS BEEN SHOWN.

A. The Conflict Was Technical.

As a result of the merger, some years ago, of two large New York banks into Manufacturers, the merged bank became a successor indenture trustee of many mortgages made by the New York Central, Pennsylvania, and the New Haven.

As earlier noted the conflict of interest first became actual when, following quickly on the inception of the Penn Central's reorganization (June 21, 1970), the Supreme Court's decision in the <u>New Haven Inclusion Cases</u>, <u>supra</u> at 4, eight days later, and Judge Anderson's Order of Notice of August 10, a hearing followed shortly on the matter of imposing an equitable lien and constructive trust. Involuntarily and through no fault of its own, Manufacturers found itself an indenture fiduciary under two mortgages (an old New York Central, and a more recent New Haven) claimed to conflict. Manufacturers, as fiduciary for these two separate mortgages, was represented by two separate law firms: the Kelley, Drye firm and ST&B.

Messrs. Iannotti and Zeldes correctly state that the insulation theory was approved neither by the New Haven Reorganization Court nor by the Penn Central Reorganization Court. (A 391). Manufacturers never petitioned either the New Haven Reorganization Court or the Penn Central Reorganization Court with regard to the appointment of a guardian ad litem, substitute trustee, or, for that matter, any advice or instructions concerning its conflicting situation. (A 387-390).

Manufacturers was involved in a technical conflict. As a matter of sound judicial administration, we believe Manufacturers should have formally taken up its problem with the New Haven Court. There was, however, no concealment. (A 512).

It should not be thought that only Manufacturers' two sets of lawyers were in court to do battle. There was a battery of lawyers present with Covington & Burling, counsel for the Penn Central Estate, as the New Haven's main opponent.

B. There Is No Issue of Damage Before This Court.

At no time has any claim for damage been alleged or proof of damage offered against Manufacturers. The record

is devoid of allegation or proof.

In his Order of August 20, 1976 Supplementing and Clarifying his opinion of June 30, 1976, Judge Anderson stated: "The issue before the court at the time the decision of June 30, 1976 was rendered concerned only the compensation of the petitioners and the reimbursement of their expenditures." (A 576). Then after briefly referring to his reasons for making a contingent award to Manufacturers, he continued:

> This court in the proceedings on the petitions for compensation and the judgment of June 30, 1976, did not adjudicate any past or future claim for damages based upon a breach of fiduciary trust on the part of the Manufacturers Hanover Trust Company as indenture trustee for the First and Refunding Mortgage Bonds of the New Haven Railroad; and the finding of such breach was made solely for the purpose of disclosing the reason underscoring the contingent nature of and the amount and time of payments of compensation, if any, which might become payable to the Trust Company. It was not intended to constitute a bar to any defense the Trust Company might interpose in an action for damages against it in any possible future litigation concerning its responsibilities as indenture trustee to the estate of the New Haven Railroad in reorganization. 5/

Messrs. Iannotti and Zeldes, the co-appellants, then are asking this Court to impose a penalty of over a million dollars because of a technical breach of fiduciary duty without any proof of damages.

5/ A 577.

C. There is No Issue in the Case That Manufacturers' Technical Conflict Caused Legal Damage to the New Haven Estate Because of the Jurisdictional Reversal.

The matters of equitable lien and constructive trust, and jurisdiction of the New Haven Court to impose them upon property subject to the jurisdiction of the Penn Central Reorganization Court, involved legal questions. Judge Anderson held that he had jurisdiction, and adjudged both an equitable lien and constructive trust in the New Haven's favor--matters vital to the New Haven Estate.

On appeal, this Circuit reversed on the ground that Judge Anderson lacked jurisdiction. Accordingly it did not proceed to make an adjudication in favor of or against the claimed equitable lien and constructive trust. In re New York, New Haven and Hartford Railroad, 457 F.2d 683 (2 Cir.), cert. denied, 409 U.S. 890 (1972).

So that the co-appellants may not properly contend that Manufacturers' conflict of interest possibly caused damage to the estate as a matter of law because of the above reversal, it must be remembered that the equitable lien and constructive trust fell because of the judicial process, and not because of indenture trustees or lawyers.

Professor Morgan gave the following description of

the methodology of determining domestic law:

> In determining the content of applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process.6/

6/ Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 270-271 (1944), quoted with approval, Advisory Committee on Evidence, 10 Moore's Federal Practice § 201.01 [3.-1] at II-12 (2d ed. 1976).

III. THE CASES REFLECT THE THEORY OF A BANKRUPTCY COURT AS A FLEXIBLE COURT OF EQUITY

All concede that a bankruptcy court is a court of equity; but just as the chancellor's foot varies from chancellor to chancellor, so do conceptions of equity. The holdings are fairly consistent, although the language of various opinions may seem conflicting. The later cases, though, tend to state a realistic and just philosophy recognizing that conflicts of interest and breaches of fiduciary duty may vary from the wanton (even criminal) to the technical that may have caused embarassment but no legal harm to anyone. And conflicts may be easy or difficult to avoid.

The golden thread that binds the following cases is to fit the punishment to the gravity of the wrong.

We have not been able to locate a case where either the Interstate Commerce Commission or a reorganization court dealt directly with the conflict of interest question under § 77(c)(12). In each instance where a conflict of interest issue seems to have been present, the Commission disposed of the matter on other grounds. Thus, in Long Island Railroad Reorganization 295 I.C.C. 208 (1955), Nassau County, New York sought an allowance of $80,936 for compensation and expenses out of the debtor's estate, primarily for the work performed by the county's counsel. The Commission allowed only $39,250,

largely on the dual basis that much of the work involved was either of no benefit to the estate (as distinct from a benefit to the county) or was duplicative of the work of others.[7/] In doing so, however, the Commission commented on a conflict of interest point as follows:

> We are of the opinion that the circumstances do not justify imposing on the railroad the entire burden of meeting the cost of petitioner's representation in the proceeding. <u>In certain respects, positions taken by petitioner obviously were adverse to that which would have been most beneficial to the estate and to the creditors and stockholders as a whole.</u> Also, a great portion of the services rendered, for example, those designed to correct alleged inequitable contracts with the Pennsylvania Railroad Company and the New York Connecting Railway Company, were duplicative of those rendered by the Debtor's trustees, who were primarily responsible for the operation of the debtor's properties and protection of its estate. The maximum hereinafter fixed, therefore, will reflect our view as to the contributive value to the proceeding of counsel's services, without in any way reflecting upon the reasonableness to his client of the amount paid by the latter.[8/]

While the case law under § 77(c)(12) regarding the effect of a conflict of interest comparable to the situation under consideration is thus unclear, the courts have squarely dealt with the issue under Chapter X[9/] (and its predecessor, § 77B), most notably in <u>Woods v. City National Bank & Trust Co.</u>, 312 U.S. 262 (1941). <u>Woods</u> involved an appeal from an order

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7/ <u>See</u> 295 I.C.C. at 215.

8/ <u>Id.</u> (emphasis added).

9/ 11 U.S.C. §§ 501 <u>et seq.</u>

of a reorganization court disallowing a number of claims for compensation and expenses incurred in the course of the complex and protracted reorganization of an apartment hotel company. The claimants were an indenture trustee, a bondholder committee, and the committee's counsel, the latter also serving as counsel to the indenture trustee. Without attempting to describe the various conflicts of interest among these parties _inter se_ and with others,[10] the essential basis for the disallowance of these claims by the reorganization court was that the claimants were pursuing interests of their own that were either of no benefit to the estate or, more often, were adverse to it. In _affirming_ the reorganization court's order, the Supreme Court set forth basic standards for determining compensation claims under these circumstances:

> Under chap. X of the Chandler Act the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable. Reasonable compensation for services rendered may be allowed. The claimant, however, has the burden of proving their worth. Furthermore, "reasonable compensation for services rendered" necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act. American United Mut. L. Ins. Co. v. Avon Park [311 U.S. 138]. Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting

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10/ _See id._ at 263-67.

interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted. Cf. Jackson v. Smith, 254 U.S. 586, 589. . . .The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules, is apposite here: "What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases." Weil v. Neary, 273 U.S. 160, 173. . . .Furthermore, the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation.

. . . A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd." See Mr. Justice Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545. . . .

Some discrimination, however, is necessary in applying the foregoing rule to claims for expenses. Reimbursement for "proper costs and expenses incurred in connection with the administration" of the estate may be allowed. The rule disallowing compensation because of conflicting interests may be equally effective to bar recovery of the expenditures made by a claimant subject to conflicting interests. Plainly

> expenditures are not "proper" within the meaning of the Act where the claimant cannot show that they were made in furtherance of a project exclusively devoted to the interests of those whom the claimant purported to represent. 11/

The Woods case and a companion case involving defaulted municipal bonds 12/ stand for the proposition that a reorganization court may disallow all fees, expenses, or other compensation sought by parties having a conflict of interest. 13/

And complete disallowance may be warranted by a contract to split fees in violation of the bankruptcy rules; 14/ or by violation of § 249 of Chapter X 15/ dealing

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11/ Id. at 267-9 (footnotes omitted).

12/ American United Mut. Life Ins. Co. v. City of Avon Park, 311 U.S. 138 (1940).

13/ Denial of such compensation seems to rest on a combination of two principles: (1) denial is a penalty for misconduct and acts to deter such actions by others; and (2) the services contributed nothing of benefit to the estate. The former principle was dominant in the Woods case; in more recent Chapter X cases, such as the ones cited in the text, the latter element appears to have been given more weight.

Mosser v. Darrow, 341 U.S. 267 (1951), cited by Appellants, does not deal with the effect of a technical conflict upon allowances, but is a case surcharging the reorganization trustee for profits made by his employees in undisclosed trading, permiteed by him, in securities of subsidiaries of common law trusts that were in reorganization.

14/ Weil v. Neary, 278 U.S. 160 (1929).

15/ 11 U.S.C. § 649.

with fiduciary trading.[16/]

But in the absence of a statutory mandate, or conduct comparable to that actually involved in Woods, a court of equity should and does approach matters of conflict with discernment for the factors involved.

The flexibility of equity cannot be ignored. In Chapter X cases, for example, in Chicago & West Town Rys. v. Friedman, 230 F.2d 364 (7th Cir.), cert. denied, 351 U.S. 943 (1956), the law firm which represented a bondholder's committee of the debtor, an interurban railroad, also represented a potential buyer of the debtor. Acting in the latter capacity, apparently with the knowledge of the bondholders' committee, an associate of the firm drew up a plan for the purchase and sale of the debtor's assets for which the firm was to be paid by both sides; the sale never went through. Notwithstanding the conflict of interest, the firm sought and was awarded $12,000 from the debtor's estate by the reorganization court. In reducing this sum to $7,000 the appellate court stated:

> When the conflict of interest arose in May, 1953, petitioners should have followed the example of Bell, Boyd, Marshall and Lloyd, and have withdrawn as counsel of the Friss Committee. Not

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16/ Wolf v. Weinstein, 372 U.S. 633 (1963).

having done so, they should be penalized in any allowance for fees that may be made. Authority exists for the disallowance of all fees. Woods v. City National Bank & Trust Company of Chicago, 312. U.S. 262, 269, 61 S.Ct. 493, 85 L.Ed. 820. But in several reorganization cases a less harsh rule has been adopted. A penalty of less than full forfeiture was approved in Silbiger v. Prudence Bonds Corporation, 2 Cir., 180 F.2d 917, 921; Berner v. Equitable Office Bldg. Corp., 2 Cir., 175 F.2d 218, 221. We may decide the extent of the penalty. Fuller v. Memphis St. Ry. Co., 6 Cir., 110 F.2d 577, 578.

Petitioners had rendered services of value to the Estate up to May, 1953. We think some reasonable allowance for such services should be made. We hold that the allowance for petitioners' fees as made by the District Court should be reduced by $5,000, and that petitioners should pay the costs on this appeal including all expenses for printer's fees for the record and briefs which were incurred by objectors, the appellants herein.

The order of the District Court allowing fees to Friedman and Rosenfield will be modified by reducing the amount of such allowance to $7,000. The costs of printing the record and the appellants' brief and reply brief will be taxed against appellees, Friedman and Rosenfield. 17/

The cases cited by the <u>Friedman</u> court as favoring a less drastic penalty than full forfeiture are distinguishable from the <u>Woods</u> case, as well as from the case in which they were cited. 18/

17/ 230 F.2d at 369.

18/ While it may appear from the quotation that Fuller v. Memphis Street Ry., 110 F.2d 577 (6th Cir. 1940), is cited as authority on the conflict of interest point, the case does not deal with that issue.

In Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2d Cir.), cert. denied, 340 U.S. 813 (1950), the reorganization court had allowed compensation to an attorney who represented holders of two classes of bonds whose interests were conflicting. The award of compensation was to be deducted from the amount to be distributed to the holders of the one series of bonds who received substantially the full amount of their claim.

Even though the attorney represented conflicting interests, Judge Learned Hand, speaking for the appellate court, distinguished the case of a corporate reorganization from the other situations in which an attorney represents two clients with opposing interests:

> [I]n a corporate reorganization proceeding it is reasonable not to impose an entire forfeiture of the allowance, when it comes in no part out of any group that can have been prejudiced by the attorney's divided allegiance. 19/

Since the award was paid from the bond series which was fully compensated in the reorganization, the court considered that the attorney's allowance should only be reduced, not denied.

The opinion in the second case cited, Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir. 1949),

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19/ 180 F.2d at 921.

was also written by Judge Hand. In that case, the attorney for shareholders of the debtor was found to have breached his duty to the shareholders as a class by giving an outsider an opportunity to purchase shares at a price lower than that which concealed facts would justify. Judge Hand held that Congress, under § 249 of the Bankruptcy Act, 11 U.S.C. § 649, had limited the penalty of entire forfeiture of allowances for fees and expenses to cases in which the claimant purchased property of the beneficiary. However, because of the breach of trust, the court applied the penalty which attends such breach, to wit: a reduction in the allowance for fees in proportion to the gravit of the breach.

The cases cited deal principally with issues of compensation.[20/] Manufacturers' petition deals principally with reimbursement of expenses, including legal fees and expenses of ST&B. (A 488). As previously noted in connection with the court's judgment, Manufacturers' claim for its own compensation ($304,416.67) is made contingent on future recovery by the New Haven Trustee from Penn Central. And a contingency factor, dependent

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20/ The final quoted paragraph of the *Woods* case, *supra* at 21, indicates the appropriateness of drawing a distinction between compensation and reimbursement of expenses.

pendent on future recovery, is also made to the Bondholders Committee, to Chase Manhattan, and to ST&B, but this factor supplements definite awards made to those persons.

Appellants have failed to show any abuse of discretion on the part of Judge Anderson, with his long familiarity with this proceeding, sufficient to warrant this Court's looking at such questions anew.

Discretion of the chancellor has not been impaired.[21/] Circumstances, of course, may warrant, as in Woods, the chancellor's denying some or all of the compensation applied for.[22/] But the nisi prius judge is in the

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21/ See Restatement (Second) of Trusts § 243 (1954). The case cited for the proposition that the Second Circuit has curtailed the lower court's discretion in this area, Surface Transit, Inc. v. Saxe, Bacon & O'Shea, 266 F.2d 862 (2d. Cir.), cert. denied, 361 U.S. 862 (1959), is inapposite. That case, which involved § 249 of the Bankruptcy Act relating to the denial of compensation to fiduciaries who trade in the debtor's stock, held, for the purpose of that section, that, in the circumstances there presented, a wife's stock was held beneficially by her fiduciary husband.

22/ In re American Acoustics, Inc., 97 F. Supp. 586 (D.N.J.), aff'd, 192 F.2d 81 (3d Cir. 1971) (denial of fees to attorney who represented adverse interests); In re Ritz Carlton Restaurant & Hotel Co., 60 F. Supp. 861 (D.N.J. 1945) (disallowance to bondholders' committee, indenture trustee and trustee's counsel where committee had preempted trustee's independent judgment).

best position to render judgment. And unless the matter is controlled by statute, or he has overlooked some egregious matter, or error is clear, then the trial judge's discretion should be respected.

In the case at bar Judge Anderson has presided over the New Haven Reorganization since mid-1961. He was thoroughly aware of the New Haven's vicissitudes, knew the lawyers involved, and what they had contributed. And lastly, he was in a position to make and did make an appropriate judgment of Manufacturers' position and its bearing on the reorganization, particularly when Manufacturers had made substantial contributions to the New Haven estate prior to conflict between them.

CONCLUSION

The Judgment of June 30, 1976, which has been appealed by the co-appellants, Lawrence W. Iannotti, Successor Indenture Trustee under The New York, New Haven and Hartford Railroad Company's First and Refunding Mortgage, dated as of July 1, 1947, and by Jacob D. Zeldes, Successor Indenture Trustee under The New York, New Haven and Hartford Railroad Company's General Income Mortgage, dated as of July 1, 1947, should be affirmed in all respects.

James Wm. Moore
by [illegible]

JAMES WM. MOORE
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Dated: December 20, 1976

CERTIFICATE OF SERVICE

I, Morris Raker, a member of the Bar of this Court and attorney for appellee, Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, hereby certify that on this date I made service of the foregoing brief of Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor, by mailing a copy to each of the individuals on the attached list.

Morris Raker

Morris Raker

Swor to before me this
20th ay of December, 1976

Evelyn F. Walsh

Nota Public

My commission expires: 4/7/83

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